

2012 WL 7177357 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Maricopa County

Ethan NEWMAN, Plaintiff,

v.

SELECT SPECIALTY HOSPITAL--ARIZONA, INC., a Delaware corporation, dba Select Specialty Hospital--Arizona (Scottsdale Campus); Select Medical Corporation, a Delaware corporation Sharon Anthony, Chief Executive Officer; and John Does 1-200, Defendants.

No. CV2010-033589.
August 2, 2012.

Plaintiff's Response to Defendants' Motion for Partial Summary Judgment

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Honorable [Arthur Anderson](#).

(Oral Argument scheduled on August 31, 2012 at 10:00 a.m.)

(Court Reporter Requested)

Plaintiff hereby responds to the motion for partial summary judgment filed by Defendants. For the reasons discussed herein, and pursuant to the standards set forth in [Orme Sch. v. Reeves](#), 166 Ariz. 301, 311, 802 P.2d 1000, 1010 (1990), and in giving Plaintiff every favorable inference, *see* [Andrew v. Blake](#), 205 Ariz. 236, 240, 69 P.3d 7, 11 (2003), the court should deny summary judgment regarding punitive damages. CEO Sharon Anthony; and Select Medical Corporation. Plaintiff incorporates herein his separate statement of facts ("PSOF"); response to Defendants' statement of facts ("RSOF"); and the following memorandum of points and authorities.

MEMORANDUM OP POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

Ethan Newman was eighteen years old when he was admitted to Select Specialty Hospital on December 19, 2008. PSOF ¶ 1. He presented to Select Specialty Hospital status post motorcycle accident resulting in numerous serious injuries, including paralysis, [skull fracture](#), facial fractures, [pelvic fractures](#), and [closed head injury](#), PSOF ¶ 2.

A. [Pressure Ulcers](#)

At the time of admission, Mr. Newman had a high risk for skin breakdown due to his immobility, incontinence, existing [pressure ulcers](#), and numerous medications. PSOF ¶ 25, Select -- a long term acute care hospital -- promotes itself as equipped to deal with seriously ill, complex patients. PSOF ¶¶ 200, 204, 205, 208, However, due to Select's shoddy documentation, it is difficult to fully understand what exactly occurred at Select but what is clear is that because of the substandard care he received at Select Specialty Hospital, Mr. Newman suffered the worsening of his sacral [pressure ulcer](#), which caused him pain, and currently

renders him more susceptible for Ulcers in the future. PSOF ¶¶ 15-18, 170. That substandard care includes disregarding the most basic tenets of care, particularly essential turning and repositioning, and neglecting to provide necessary wound treatments. PSOF ¶ 12.

Ethan Newman was documented by Select Specialty Hospital staff to have a stage 1 [pressure ulcer](#) measuring 4cm x 1cm with no depth upon admission. One of the most basic, but important services that needs to be provided for patients for the healing of [pressure ulcers](#) is pressure relief. PSOF ¶ 51. This is because the main cause of [pressure ulcers](#) is pressure. PSOF ¶ 52. The most elementary method for providing pressure relief is frequently turning and repositioning of the patient PSOF ¶ 53. Turning and repositioning was especially important for Mr. Newman because he was paralyzed and heavily medicated on morphine. PSOF ¶ 60. He should have been turned at least every two hours. PSOF ¶¶ 61. It is evident from the Select Specialty Hospital records that Mr. Newman was not provided this very basic Service. PSOF ¶ 64.

Every time turning and repositioning is provided, it is documented in the patient's chart PSOF ¶ 63. Mr. Newman's chart showed a clear, ongoing pattern of hospital staff's neglect in providing this necessary care. For example, there was no documentation of turning and repositioning for a period of 13 hours on December 20 and 25, 2008. PSOF ¶¶ 65, 69. There was no documentation of turning and repositioning for a period of 12 hours on December 21, 24, and 28, 2008, and January 4, 2009. PSOF ¶¶ 66, 68, 72, 77. Mr. Newman was documented to have been turned and repositioned only five times during a 24 hour period on December 23, 2008, three times during a 24 hour period on December 26, 2008, and twice during a 24 hour period on December 27, 2008. PSOF ¶¶ 67, 70, 71. Mr. Newman was documented to have been turned and repositioned only once during a 13 hour period on December 29, 2008 PSOF ¶ 73. He was documented to not have been turned for a 6 hour period of December 30 and 31, 2008 PSOF ¶¶ 74, 75. The documentation showed Mr. Newman was not turned and repositioned for a 14 period on January 1, 2009, and there was no documentation of turning and repositioning at all on January 8, 2009. PSOF ¶¶ 76, 78. There is no disputing that Select Specialty Hospital staff were neglecting to provide Mr. Newman the most basic and necessary care.

Ethan Newman and his family members were concerned about him not being turned and repositioned enough while a patient at Select Specialty Hospital. PSOF ¶ 62, 86. At one point during his stay, a turning log was placed in Mr. Newman's room for staff to sign when they turned and repositioned him after his mother had complained. PSOF ¶ 81. However, the turning log was not followed. PSOF ¶ 82. Even Select staff had their own concerns about Mr. Newman's care. One respiratory therapist testified that he was concerned about Mr. Newman not being turned enough, and had brought his concern to the attention of a nurse. PSOF ¶ 87, 88. He was also concerned that Select Specialty Hospital was not the right facility for Mr. Newman because some of the staff had never cared for quadriplegic patients prior to Select, and did not receive training on such care upon hire. PSOF ¶ 135, 136.

Another basic service that needs to be provided in order to facilitate healing of [pressure ulcers](#) is to provide adequate hygiene care to prevent fecal and/or urinary contamination of the wound. This is especially important when the patient has a sacral ulcer, which is near the perineal area. Select staff failed in this regard. PSOF ¶ 112. Ethan Newman's room had a foul odor attributed to feces during much of the time he was a patient at Select Specialty Hospital PSOF ¶ 120. There were times, when Mr. Newman would soil himself and staff could not be found to assist him. After waiting an hour for assistance, Mr. Newman's mother would resort to cleaning him herself up as best she could. PSOF ¶ 121. Mr. Newman's chart reflected the hospital staff's neglect. For example, on December 27, 2008 and January 4, 5, and 6, 2009, there was no care documented for Mr. Newman after he had bowel movements. PSOF ¶ 119. The failure of Select staff to provide adequate hygiene care for Ethan Newman fell below the standard of care. PSOF ¶ 123.

In addition to providing adequate pressure relief and proper hygiene. Select staff had the duty to provide proper wound care for patients who have [pressure ulcers](#) to facilitate healing. PSOF ¶ 91. Select failed to provide Mr. Newman with adequate wound care and treatment PSOF ¶ 93. Mr. Newman was admitted to Select, Specialty Hospital with a [stage II pressure ulcer](#). A [stage II pressure ulcer](#) is a wound that requires treatment. PSOF ¶ 94. When a patient is admitted with a [stage II pressure ulcer](#), the physician needs to be alerted so that treatment orders can be obtained, and it would not be proper nursing care to wait until a week to notify a physician of the wound. PSOF ¶ 96, 97. Defendants' standard of care expert agreed that treatment to Mr. Newman's wound should have begun the very first day of admission. PSOF ¶ 95 However, evaluation of Mr. Newman's

wound by a physician and treatment orders first appeared in the hospital records a week after admission, and there was little documentation indicating that the treatments were actually being provided per the physician's orders. PSOF ¶ 98. The failure of Select staff to obtain treatment orders for Mr. Newman's [pressure ulcers](#) in a timely manner, and failure to provide necessary wound treatments were breaches of duty and fell below the standard of care.

Importantly, Mr. Newman's wounds were not even being appropriately assessed. It is within the scope of practice for a registered nurse (RN) to perform wound assessments. PSOF ¶ 44. Licensed practical nurses (LPNs) cannot make assessments and cannot stage wounds. PSOF ¶ 41. The wound care nurse at Select was an LPN. It was the expectation of the hospital CEO and Director of Clinical Services that an RN would review the wound documentation done by the LPN wound nurse and sign off on the documentation. PSOF ¶ 42. It was the practice of RNs to sign their name either under or above the LPN's name when the wound documentation done by an LPN was reviewed. PSOF ¶ 43. Ethan Newman's wound documentation, which was done by a LPN, were not signed off by an RN. PSOF ¶ 45. What this meant for Mr. Newman was that his wounds were not being assessed by the right personnel, and the documentation of his wounds were not accurate. The LPN wound care nurse openly admitted that the staging documented on her wound documentation didn't necessarily reflect the actual stage of Mr. Newman's wounds. PSOF ¶ 181. For example the photographic documentation of Mr. Newman's wound from December 31, 2008 states his sacral wound is a stage II. However, according to Defendants' standard of care expert, based on the documentation of slough and [eschar](#), it would have been a stage III as of that date. PSOF ¶ 180. This is significant because staging of wounds provides guidelines for treatment, and thus it needs to be accurate. PSOF ¶¶ 129, 130. The absence of proper assessments and treatments, and the lack of consistent turning and repositioning had dire consequences for Ethan Newman.

Ethan Newman's sacral wound progressed rapidly over a short period of time. During his stay at Select Specialty Hospital, the wound progressed from measuring 4cm x 1cm with no depth to 6.5cm x 4cm with a depth of 3cm which is compatible with a stage IV ulcer. With adequate wound care, pressure relief, and early treatment of the wound, it would not have progressed as rapidly or become as large, and it would not have required the type of course it needed to heal. PSOF ¶¶ 27, 102. As if he had not already suffered enough by being rendered a quadriplegic, the failures on the part of Select caused Mr. Newman needless pain and additional suffering; caused him to suffer a significant deterioration in his overall physical status; and constitute [abuse](#) and neglect under the Arizona Adult Protective Services Act. PSOF ¶¶ 12-15.

B. Documentation

Select's documentation with respect to Ethan Newman fell below the standard of care, PSOF ¶ 170. It is part of a nurse's responsibility to document the condition of the patient and the care provided. PSOF ¶ 166. Complete and accurate documentation is important in the healthcare setting because it identifies the care the patient received, and is a form of communication between and among nurses and physicians to show the status of the patient PSOF ¶¶ 165, 168. It was expected that all documentation regarding a patient's wound would be in the patient's chart. PSOF ¶ 167. Documentation is important to show that care was in fact provided, and Select staff was reminded that if it's not documented, it's not done. PSOF ¶¶ 171, 173. From the very beginning of Mr. Newman's admission to Select in December, 2008, through his discharge in January, 2009, the records were riddled with omissions, errors and inaccuracies.

Accurate documentation of a wound is important, and changes observed in connection with monitoring the progression of a wound should be documented. PSOF ¶ 175, 176. Select failed in this regard. For example, Select's records indicated that on December 31, 2008, Mr. Newman's sacral wound had a depth of 12 cm with slough and necrotic tissue. Five days later, the documentation indicated that his wound was debrided, following which his wound measured 0.2cm deep, which was 1cm less than prior to the [debridement](#). Defendants' own medical expert opined that such documentation of the wound was inconsistent, did not make sense, and did not appear accurate. PSOF ¶ 182.

C. Staffing

Part of the requirement of meeting the needs of the patients is ensuring that the facility has adequate staff, both in numbers and training. Select Specialty Hospital typically has patients who suffer from serious and often complex medical conditions that require a high degree of care. PSOF ¶ 206. Select staff indisputably had many tasks which they must complete for their patients. PSOF ¶ 19, 20, 24, 137, 160. Yet despite the high acuity of patients and the multitude of tasks and treatments to be carried out, CNAs he could responsible for as many as seventeen patients on a given shift, and nurses typically had five patients. PSOF ¶¶ 147, 148.

Concerns regarding workload and staffing from nurses, CNAs, occupational therapists, and respiratory therapists was a topic of frequent discussion at Select. PSOF ¶ 158. Several CNAs admitted that there were times when they felt short staffed and thought they would be able to provide better patient care with additional CNAs on the floor. PSOF ¶ 155-157. CNAs would voice their concerns at staff meetings about having too many patients and too many non-patient tasks such as cleaning out the refrigerator storage area, cleaning IV looks and moving equipment from one room to another PSOF ¶ 160. Nurse Matthew Baxter and other nurses expressed to management multiple times that they felt they needed additional nurses on the floor PSOF ¶¶ 143, 144. Nurse Matthew Baxter felt he would have been able to provide better patient care if there were more nurses, and was concerned about the safety of patients at Select due to the fact that there were not enough nurses. PSOF ¶ 162, 163. Additionally, there were times when it would take hours for staff to respond to call lights, PSOF ¶ 104. Adequate staff is essential in order to provide adequate care for 16 patients. Select failed in this regard.

II. LAW AND ARGUMENT

A. Punitive Damages.

Plaintiff has set forth the requisite pattern of facts to demonstrate that, in Defendants' failure to properly care for Ethan Newman, they consciously disregarded a substantial risk that their violations of the applicable standard of care created a substantial risk of significant injury to him. Punitive damages are available where defendants acted to serve their own interests, having reason to know and consciously disregarding a substantial risk that their conduct might significantly injure the rights of others or upon proof that a defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others. See RAJI (Civil) 4th, Personal Injury Damages 4; *Gurule v. Illinois Mut. Life & Cos. Co.*, 152 Ariz. 600, 602, 734 P.2d 85, 87 (1987); *Bradshaw v. Slate Farm Mut. Auto Ins. Co.*, 157 Ariz. 411, 422, 753 P.2d 1313, 1324 (1988). A single event, or a combination of circumstantial evidence, may establish that a defendant acted with sufficient recklessness for punitive damages. See *Quintero v. Rodger*, 221 Ariz. 536, 542-543, 212 P.3d 874: 880-881 (Ct. App. 2009). In addition, the *Gurule* court discussed instances where the wrongful conduct was not a single instance but was part of a pattern or practice. 152 Ariz. at 602, 734 P.2d at 87. While a single piece of evidence, taken alone, may not be clear and convincing evidence of an "evil mind," "several pieces of such evidence, taken together, might clear the evidentiary hurdle." *Thompson v. Better-Bilt Aluminum Prods. Co.*, 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992). Here, the cumulative facts demonstrate an egregious pattern of acts and omissions by Defendants which justify punitive damages.

While no Arizona cases discuss punitive damages under Arizona's Adult Protective Services Act, other jurisdictions have allowed punitive damages for conduct which is similar to that at issue here. See, e.g., *NME Props., Inc. v. Rudich*, 840 So.2d 309 (Fla. Ct. App. 2003) (punitive damages affirmed where resident suffered from stage IV **bedsores**; the **pressure sores** went untreated for days; there was a pattern of record keeping irregularities which resulted in inaccurate and non-existent records); *Rose Care Inc., v. Ross*, 91 Ark. App 187, 209 S.W.3d 393 (2005) (trial court's decision to not permit the jury to consider punitive damages reversed where resident weight dropped in 76 pounds and her **pressure sores** increased in seventy); *Estate of Youngblood v. Halifax Convalescent Ctr., Ltd.*, 874 So.2d 596 (Fla. Ct. App. 2004) (appellate court reversed a directed verdict and ordered a new trial based on the testimony of **abuse** consisting of a new stage III **pressure sore**, an eye injury and a contusion that became infected, and further noted that there was testimony that this conduct was both outrageously deficient and linked to a conscious decision to keep the facility chronically understaffed due to budget problems); *Beverly Enters.-Florida v. Spilman*, 661 So.2d 867 (Fla. Ct. App. 1995) (jury award of punitive damages upheld where the decedent's health declined during his admission to the facility, he lost 32 pounds, his **bedsores** became necrotic, and he became unable to eat and swallow); *Advocat*,

Inc. v. Saver, 353 Ark. 29, 111 S.W.3d 356 (2003) (punitive damages appropriate where the resident died from malnutrition and dehydration and where the nursing home knew that it was short-staffed, but took no measures to rectify the situation, and even attempted to disguise this fact).

Ethan Newman was a young man with his entire life ahead of him when, in the blink of an eye, a freak accident tragically changed his world forever. Mr. Newman depended on hospital staff, and believed that Select would provide the care, treatment, and services he needed. Instead, the shoddy and haphazard and, indeed, reckless care (or Jack thereof) Defendants provided to Ethan Newman resulted in the significant deterioration of his [pressure ulcer](#). Day in and day out Defendants did little as Ethan Newman's [pressure sore](#) progressively got worse. There was a pattern of neglect in providing him adequate and consistent pressure relief, which Defendants knew was important for Ethan Newman to promote healing. There was a pattern of neglect in providing him proper hygiene care. There was a pattern of neglect in proving him appropriate wound care in a timely manner. Defendants' conduct evinces a conscious disregard for Ethan Newman's health and wellbeing. Thus, Plaintiff should be permitted to present his punitive damages claim to the jury.

B. Sharon Anthony, CEO.

Plaintiff's expert, Colleen Simpson, is qualified to render opinions against Sharon Anthony [A.R.S. § 12-2604](#) regarding expert qualifications is inapplicable insofar as the instant action was brought pursuant to Arizona's Adult Protective Services Act ([A.R.S. § 46-455](#)), rather than pursuant to Arizona's Medical Malpractice Act ([A.R.S. § 12-561](#)). And, the Arizona Supreme Court in *Estate of McGill*, 203 Ariz. 525, 57 P.3d 384 (2002) made clear that APSA claims and medical malpractice claims; are, in fact, separate and distinct. If the legislature intended to include APSA claims under [A.R.S. § 12-2604](#), it would have done so, just as it did under [A.R.S. § 12-2603](#). The most compelling evidence of legislative intent is the language the legislature chose to use in the statute because it is “the best and most reliable index of a statute's meaning.” See *Bentley v. Braiding Our Future*, 217 Ariz. 265, 270, 172 P.3d 860, 865 (Ct. App. 2008) (citations omitted). Thus, if the statutory language is unambiguous, it is applied “without resorting to other methods of statutory interpretation” *Id.* See also *Backus v. State*, 220 Ariz. 101, 104 ¶ 11, 203 P.3d 499, 502 (2009) (“the best and most reliable index of a statute's meaning, is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction.”). The legislature's failure to make [A.R.S. § 12-2604](#) applicable to APSA claims is dispositive.¹

There can be no mistake that APSA and medical malpractice claims are separate and distinct [Section 46-455](#) of APSA, the statute pursuant to which Plaintiff brought this action, is entitled “Permitting life or health of an incapacitated or vulnerable adult to be endangered by neglect; violation; classification; civil remedy; definition.” Section A refers to “a person who has been employed to provide care.” *Id.* Section B permits the filing of an action in superior court “against any person or enterprise that has been employed to provide care, ...” *Id.* Section O states: “A civil action authorized by this section is remedial and not punitive and does not limit and is not limited by any other civil remedy or criminal action or any other provision of the law. Civil remedies provided under this title are supplemental and not mutually exclusive.” *Id.* (emphasis added), See, also, *Seisinger v. Siebel*, 220 Ariz. 85, 203 P.3d 483 (2009) in which the Arizona Supreme Court's analysis of [A.R.S. § 12-2604](#) is couched entirely in the medical malpractice context.

Importantly, APSA was designed to protect vulnerable and [elderly](#) adults from neglect and [abuse](#) by their care custodians. More often than not, these care custodians were providing, or promised to provide, some level of nursing or medical care to those in their care. If MMA goes the ability of vulnerable adults to proceed against care custodians in situations where any medical care or nursing care was provided, virtually no APSA action will survive.

As the *McGill* court pointed out, if MMA were the exclusive remedy in a situation such as the instant case, “the great majority of caregivers to the incapacitated would be immune from APSA actions and APSA would be a toothless tiger.” 203 Ariz. at 530, 57 P.3d at 389.² Because Plaintiff's action arises out of APSA as opposed to MMA, Plaintiff's expert, Colleen Simpson, does not need to satisfy the requirements of [A.R.S. § 12-2604](#).

However, based on her background, education, and credentials, Ms. Simpson is qualified to render expert opinions against Ms. Anthony pursuant to [Rule of Evidence, 702](#). [Rule 702](#) provides that a witness may be qualified as an expert “by knowledge, skill, experience, training, or education ...” [Rule 702](#), Ariz. R. Evid. The Arizona Supreme Court in *Seisinger v. Siebel* contrasted the precise requirements of [A-R S. § 12-2604\(A\)](#) with the more relaxed requirements of [Rule 702](#):

But particularly when the standard of care has not materially changed during the period after a physician left active practice or teaching, a trial judge might also well conclude that the witness remains qualified through “knowledge, skill, experience, training, or education” to assist the jury through expert testimony. As to such a witness, the statute automatically produces a different result than the Rule might produce.

[220 Ariz. at 90, 203 P.3d at 488](#). Thus, [Rule 702](#) does not even require that the expert be actively engaged in the area of expertise on which he is offered.

Moreover, [Rule 702](#) is not based on a witness' title or pedigree. In fact, an expert may be qualified to provide opinions based on his or her “actual experience or careful study.” *Brandy v. Ortho Pharmaceutical Corp.*, [157 Ariz 574, 587-88, 760 P.2d 574, 597-88 \(a App. 1988\)](#). Moreover, the expert does not have to have the “best possible qualifications, nor the highest degree of skill or knowledge....” *Pincock v. Dupnik*, [146 Ariz. 91, 95, 703 P.2d 1240, 1244 \(Ct. App. 1985\)](#) (citations omitted). And, “[t]he degree of qualification goes to the weight given the testimony, not its admissibility.” *Seisinger v. Siebet*, [220 Ariz. at 90, 203 P.3d at 488](#) quoting *State v. Davolt*, [207 Ariz. 191, 210 ¶ 70, 84 P.3d 456, 475 \(2004\)](#).

Plaintiff's expert, Colleen Simpson, is a registered nurse, licensed in Maryland and New York, with a current certification as a Wound [Ostomy](#) Continence Nurse. Her experience includes: wound/[ostomy care](#) at the Greater Baltimore Medical Center; long term care with Barbara J. Eagan Nursing and Rehabilitation Center; home care with Frederick Memorial Home Health Care; and acute care with The Johns Hopkins Hospital, PSOF ¶ 191. Ms. Simpson has been a Certified Wound [Ostomy](#) Nurse Specialist at Greater Baltimore Medical Center for over ten years. 75% of her time is spent providing direct patient care. She also works with vendors to develop better products and services, is involved in prevalence studies, and is a preceptor for wound [ostomy](#) continence nursing students. PSOF ¶ 192. Additionally, Ms. Simpson is familiar with Arizona statutes pertaining to vulnerable adult [abuse](#) and neglect, as well as Federal regulations and the Arizona Administrative Code regulating hospitals. PSOF ¶ 193.

Sharon Anthony, as CEO, was responsible for ensuring that Select Specialty Hospital provides care in accordance with the federal regulations, that patients get proper care, that the nursing care provided to patients meets the standard of care, and ensure patients are not [abused](#) or neglected. PSOF ¶¶ 186-189. Although Ms. Simpson does not have experience as a CEO of an LTAC, she is capable of rendering opinions regarding areas in which the CEO is responsible for which reflects upon CEO's performance of her duties. Colleen Simpson has the education training, experience, and knowledge to competently testify regarding whether the care provided at Select Specialty Hospital in fact was in accordance with the federal regulations and the standard of care, and whether patients were [abused](#) or neglected. Ms. Simpson clearly meets the [Rule 702](#) standard for offering expert opinions against Select CEO Sharon Anthony.

F. Corporate Defendants.

1. Direct Liability

Select Medical Corporation can be held liable for the injuries, and pain and suffering of Ethan Newman. The Arizona Adult Protective Services Acts [A.R.S. § 46-455 \(B\)](#), permits “an incapacitated or vulnerable adult whose life or health is being or has been endangered or injured by neglect, [abuse](#) or exploitation” to file a lawsuit “against any person or enterprise that has been employed to provide care, that has a legal duty to provide care or that has been appointed by a court to provide care....” As evidenced by his [pressure sore](#), Mr. Newman suffered such [abuse](#) and neglect at Select Specialty Hospital. Despite being

aware of Mr. Newman's need for intense nursing supervision and assistance to ensure his health, safety, and well-being, the nursing staff at Select Specialty Hospital failed to provide adequate care, supervision, and monitoring.

APS A permits Plaintiff to file a lawsuit against a person or enterprise that has a duty to provide care. Select Medical Corporation is an enterprise that assumed the duty to provide care to the patients of Select Specialty Hospital including Ethan Newman, and they failed miserably. In order to be liable, however, direct care responsibilities are not required. Thus, Plaintiff's claims against Select Medical Corporation are appropriate.

In *Corbett v. Manor Care of America*, 213 Ariz. 618, 146 P.2d 1027 (Ct. App. 2006), one issue before the court was whether the scope of liability under APSA was limited to employees who had a direct caregiver-patient relationship with the patient. The defendant employees in *Corbett* argued that A.R.S. § 46-455 requires a direct caregiver-patient relationship for a duty to arise. However, the court found that reliance on the “proposition that APSA requires a direct caregiver-patient relationship is misplaced.” 213 Ariz. at 628, 146 P.2d at 1037. The court further explained that “statutory language controls our interpretation when the language is clear and unequivocal,” 213 Ariz. at 629, 146 P.2d at 1038 (citing *Mercy Healthcare Arizona, Inc. v. Arizona Health Care Cost Containment Sys.*, 181 Ariz. 95, 98, 887 P.2d 625, 628 (Ct. App 1994)).

The *Corbett* court went on to explain that “[u]nder the plain wording of the statute, an incapacitated or vulnerable adult can bring a lawsuit against ‘any person or enterprise’ that ‘has been employed to provide care’ or that ‘has assumed a legal duty to provide care’ if the person or enterprise has ‘caused Or permitted’ the incapacitated or vulnerable adult to be **abused**, neglected, or exploited.” 215 Ariz. at 629; 146 P.2d at 1038 (citing A.R.S. § 46-455(B)). Accordingly the *Corbett* court ultimately held:

...that the legislature did not intend to limit liability to those who have a direct caregiver-patient relationship with an incapacitated or vulnerable adult. The statute subjects to liability both persons and enterprises, not just individuals. Furthermore, the statute subjects to liability those who cause or *permit* the **abuse**, neglect, or exploitation or an incapacitated or vulnerable adult.

213 Ariz., at 629, 146 P.2d at 1038. Thus, the *Corbett* court has already decided the issue of liability of a person or enterprise who did not have direct care responsibilities for a patient. Such a relationship is not a prerequisite to holding a person Or enterprise liable for harm suffered by a patient.

Here, Plaintiff has alleged that Select Medical Corporation caused and/or permitted Ethan Newman to be subjected to **abuse** and neglect. Extensive evidence exists which establishes the Select Medical Corporation involvement, operation, management, and control of Select Specialty Hospital for imposition of direct liability under APSA for causing and/or permitting the injuries to Ethan Newman.

Select Medical Corporation has implemented a code of conduct for its employees that staff its hospitals throughout the United States. This code of conduct requires that “[i]n any discussion with patients regarding their referral to a facility that is owned, controlled or managed by Select Medical. Company personnel shall disclose the nature of the relationship between Select Medical and such facility in accordance with Select Medical's policies and procedures and state and federal laws, in the interest of promoting patient freedom of choice,” PSOF ¶ 228. Significantly, Select Medical Corporation represents itself as “a leading operator of specialty hospitals and outpatient rehabilitation clinics in the United States. As of December 31, 2007, we operated 83 long-term acute care hospitals and four acute medical rehabilitation hospitals in 25 states, and 999 outpatient rehabilitation clinics in 37 states and the District of Columbia...” Select Medical Corporation is managed through two business segments, “our specialty hospital segment and our outpatient rehabilitation segment. We had net operating revenues of \$1,991.7 million for the year ended December 31, 2007. Of this total, we earned approximately 70% of our net operating revenues from our specialty hospitals and approximately 30% from our outpatient rehabilitation business for the year ended December 31, 2007.” PSOF ¶¶ 204, 205. Select Medical Corporation markets itself to patients in need of highly specialized care such as Ethan Newman, contending that its “specialty hospital segment consists of hospitals designed to serve the needs of long-term stay acute patients and hospitals designed to serve patients that require intensive medical rehabilitation care. Patients in our long-term acute care

hospitals typically suffer from serious and often complex medical conditions that require a high degree of care ...” PSOF ¶ 206. Indeed, Select Medical Corporation asserts that its “long-term acute care hospitals (LTACs) primarily operate as Select Specialty Hospitals. These hospitals provide highly specialized care to promote recovery from the most critical and complex medical and surgical conditions. Every Select LTAC hospital has physicians on staff representing different specialties, as well as an experienced team of caregivers including nurses, respiratory therapist, pharmacists, and rehabilitation therapists. The hospitals are designed to offer patients a longer length of stay and a more resource-intensive level of physician and nursing care respiratory services and individualized therapies ...” PSOF ¶ 212.

In addition to owning and operating its numerous long term acute care hospitals Select Medical Corporation has a close hand in the actual operation of its facilities. It has a stringent code of conduct with which all employees must abide. “Decisions with respect to disciplinary action are within the sole discretion of Select Medical, along with others, including the Compliance Officer, the Legal Department Human Resources and other appropriate personnel...” PSOF ¶ 226. Select Medical Corporation also has a hand in policies and procedures, which the Select Specialty Hospital staff are expected to follow. PSOF ¶¶ 253, 279. Among the requirements mandated by Select Medical Corporation is that medical records documentation meet the requirements of the medical staff bylaws, facility or rehabilitation unit policies, applicable laws, regulations and accreditation standards (which as established above, clearly were not met with respect to Ethan Newman). PSOF ¶ 230. The wound care protocol for the hospitals is developed at the corporate level. PSOF ¶ 280. Moreover, training materials for hospital staff are provided by Select Medical Corporation, and the hospital Director of Clinical Services is trained directly by the corporate regional chief nursing officers. PSOF ¶ 282, 283.

In sum, Select Medical Corporation clearly assumed vital roles in the operation and management of Select Specialty Hospital. In connection therewith, they also assumed significant responsibilities and duties, including responsibilities related to employment practices and even wound care protocols. Having undertaken such vital roles and responsibilities in the operation and management of their numerous facilities, including Select Specialty Hospital in Scottsdale, Arizona where Ethan Newman was a patient, Select Medical Corporation assumed a duty to the facility patients and can be liable for causing and/or permitting **abuse** and/or neglect of patients, including Ethan Newman.³

3. Vicarious Liability

In addition to direct liability, Select Medical Corporation may be vicariously liable for the negligent or tortious acts of their employees committed within the course and scope, of their employment. *See Baker ex. rel. Hall Brake Supply, Inc. v. Stewart*, 197 Ariz. 535, 540, 5 P.3d 249, 254 (Ct App. 2000). Thus, Plaintiff must establish that the Select Specialty Hospital employees were acting within the course and scope of their employment with respect to their treatment of Ethan Newman. An employee's conduct falls within the scope of their employment “if it is the kind the employee is employed to perform, it occurs within the authorized time and space limits, and furthers the employer's business even if the employer has expressly forbidden it.” 197 Ariz. at 540, 5 P.3d at 254.

There can be no dispute that the individuals who were charged with caring for Ethan Newman while he was a patient at Select Specialty Hospital between December 18, 2008 and January 9, 2009 were in fact, employees of the Select Medical Corporation. Select Medical Corporation touts that with its 89 Select Specialty Hospitals located in 25 states, it has nearly 11,000 employees. PSOF ¶ 215. Per Select Medical Corporation, each of these hospitals offers the following staff members and services; medical director; multi-specialty medical staff; daily physician visits; 24-hour respiratory care, 24-hour nursing care ACLS/ICU experienced; case, management; 24 hour pharmacy; physical and occupational therapy; speech therapy; nutritional care; radiology and lab services; patient and family education.” PSOF ¶ 215.

Moreover, according to its code of conduct, Select Medical workforce members are “all staff that provide services on behalf of Select Medical Corporation or one of its United States based Subsidiaries...” PSOF ¶ 222. The code of conduct applies to Select Medical Corporation “and each of its employees officers, directors, medical staff independent contractors, vendors, representatives and agents of its United States based subsidiaries, affiliates and joint venture entities controlled by Select

Medicaid.” PSOF ¶ 223. The code of conduct also provides that “... all employees are required to observe all applicable legal and regulatory requirements and Select Medical's Compliance Program, and are responsible for ensuring that their conduct conforms to such standards. Adherence to the Compliance Program is a condition of employment and continued employment with the Company and “will be taken into consideration in connection with periodic performance reviews and other evaluations...” PSOF ¶ 234. Select Medical Corporation also expects loyalty from its thousands of employees; “Ail Select Medical employees have a duly to carry out their Job responsibilities in a loyal manner on the basis of what is in the Company's best interests and independent of personal considerations ...” PSOF ¶ 232.

In addition, Select Specialty Hospital staff understands themselves to be Employees of Select Medical Corporation. PSOF ¶¶ 250, 259, 265. Their paychecks come from Select Medical Corporation, and their employee benefits are managed by the Select Medical Corporation human resources department PSOF ¶¶ 267, 277.

The individuals working at the hospitals owned by Select Medical are no; only employees of Select Medical Corporation but in rendering services to their patients, including Ethan Newman, they were engaging in conduct within the scope of their employment. As discussed, Select Medical Corporation specializes in the treatment of the most critical and complex medical and surgical conditions. Select Medical, through its various hospitals, offers a variety of programs and services to match the patient's acuity and individual needs. Select Medical tours that the physicians on its medical staff, along with its nurses and therapists, work closely together to improve the physical, emotional and functional wellness of their patients. PSOF ¶¶ 200, 206, 208, 212, 219.

Because the individuals who provided care to Ethan Newman at Select Specialty Hospital in Scottsdale, Arizona are employees of the Select Medical Corporation, and because such Individuals were acting within the course and scope of their employment with Select Medical Corporation, it can be held liable for the negligence and neglect which resulted in injuries to Ethan Newman.

4. *Alter Ego*

Because Plaintiff has established that Select Medical Corporation can be directly and vicariously liable for the negligent acts and omissions which led to Ethan Newman's injuries, the Court does not need to reach the issue of piercing the corporate veil in this case. However, sufficient evidence does exist to warrant piercing the corporate veil to hold Select Medical Corporation liable for Ethan Newman's injuries.

A parent corporation may, pursuant to an alter ego theory, be held liable for the acts of its subsidiary “when the individuality or separateness of the subsidiary corporation has ceased,” See *Gatecliff v. Great Republic Life Ins. Co.*, 170 Ariz. 34, 37, 821 P.2d 725, 728 (1991). See also *Pan Pacific Sash and Door Co., v. Greendale Park, Inc.* 166 Cal.App.2d 652, 333 P.2d 802 (1958) (“Where injustice would result from a strict adherence to the doctrine of separate corporate existence, a court will toot behind the corporate structure to determine the identity of the party who should be charged with a corporation's liability ... Since the separate personality of a corporation is but a statutory privilege it must not be employed as a cloak for the evasion of obligations.”); *Los Palmas Assocs. v. Las Palmas Or. Assocs.*, 235 Cal. App.3d 1220, 1249, 1 Cal. Rptr. 2d 301 (1991) (“A very numerous and growing class of cases where the corporate entity is disregarded is that wherein it is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality, agency, conduit, or adjunct of another corporation ... it would be unjust to permit those who control companies to treat them as a single or unitary enterprise and then assert their corporate separateness in order to commit frauds and other misdeeds with impunity”).

In order to prevail under an alter ego theory, a plaintiff-must prove unity of control and that observance of the corporate form would endorse a fraud or result in injustice, *Gatecliff v. Gnat Republic Lift: Ins. Co.*, 170 Ariz. at 37, 821 P.2d at 728. Factors which may suggest substantially total control include, among other things:

Stock ownership by the parent; common officers or directors; financing of subsidiary by the parent; payment of salaries and other expenses of subsidiary by the parent; failure of subsidiary to maintain formalities of

separate corporate existence; similarity of logo; and plaintiff's lack of knowledge of subsidiary's separate corporate existence.

[170 Ariz. at 37, 821 P.2d at 728.](#)

Here, the evidence indisputably demonstrates Select Medical Corporation's operational involvement, management, direction and control of, and unity with, Select Specialty Hospital in Scottsdale, Arizona including regarding policies and procedures related to employees, documentation, and wound protocols. PSOF ¶¶ 195-284. Moreover, Select Specialty Hospital Arizona Inc. dba Select Specialty Hospital and Select Medical Group share a common address and common officers and directors -- most notably Rocco Ortenzio; Robert Ortenzio; and Michael Tarvin. PSOF ¶¶ 196-199. The Select Medical Corporation logo and contact information is also noticeably displayed by the local facility whose webpage provides significant information about the corporate owners, including corporate-wide employment information and contact information and vice versa, and the Select Medical Corporation logo used to be on the hospital uniforms PSOF ¶¶ 214 -- 219, 238, 239, 245. In addition, Select Medical Corporation derive substantial revenue from the operation of its many facilities. For the third quarter of 2011, net operating revenues for all of Select Medical's hospitals increased 24.1% to \$521.1 million compared to \$419.8 million for the same quarter, prior year. PSOF ¶ 241. And the future looks bright for Select Medical Corporation as per a recent news release: "Select Medical is increasing its prior business outlook for calendar year 2011. Select Medical now expects net revenue for the full year 2011 to be in the range of \$2.76 billion to \$2.80 billion..." PSOF ¶ 242.

Titus, as can be seen, the lines among and between the entities are significantly, and indeed deliberately, blurred. Select Medical Corporation is at the helm and is the entity controlling its many facilities and the employees staffing those facilities. Webpage information by one provides information about, and links to the others. And as a self-proclaimed leader in the industry, and through the operation of numerous facilities and the employment of thousands of employees, Select Medical Corporation derives great financial benefit. Finally, injustice will occur if injured patients of Select Specialty Hospital, including Ethan Newman, are prevented from holding liable the very entities which are intimately involved in operating, managing, and directing the facility. As such, piercing the corporate veil is appropriate.

III. CONCLUSION

Based on the foregoing, Plaintiff respectfully urges the court to deny summary judgment with respect to punitive damages; CEO Sharon Anthony; and Defendant Select Medical Corporation.

Dated this 2nd day of August, 2012

WILKES & MCHUGH, P.A.

By: /s/ Donna Y. Oh

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Footnotes

- 1 If the legislature had wanted to broaden the scope of [A.R.S. § 12-2604](#) to encompass a wider range of claims. It would have done so. For instance, the legislature could have stated that [A.R.S. § 12-2604](#) is applicable in an action alleging medical malpractice or in any other action against a licensed health care provider. Instead of doing so, the legislature specifically restricted [A.R.S. § 12-2604](#) to medical malpractice actions only.
- 2 Other jurisdictions agree that where the basis of the action is **elder** or vulnerable adult **abuse**, the procedural requirements for professional negligence causes of action give way to the procedural requirements for that state's **elder** and vulnerable adult protection statutes. *County Villa Claremont Health Care Center v. Superior Courts*, 120 Cal. App. 4th 426, 15 Cal. Rptr. 3d 315 (2004) (procedural statute for punitive damages claim in professional negligence against health care provider did not apply to this action); *Integrated Health Care Survives, Inc. v. Long-Redway*, 840 So.2d 974 (Fla. 2003) (complaint that nursing home violated its statutory duty to provide adequate and appropriate health care to resident did not plead a medical malpractice cause of action against a healthcare provider, and thus Plaintiff was not required to comply with statutory pre-suit requirements for filing a medical malpractice action).
- 3 Select Medical Corporation may also be liable as a joint venture or enterprise. A joint venture exists if there is a contract; a common purpose; a community of interest equal right to control; and participation in the profits and losses, *Tanner Cos. v. Superior Court*, 144 Ariz. 141, 143, 696 P.2d 603 (1965) (citation omitted). With respect to the element of control, "each joint venture must share, to some extent, in the control of the venture. In other words, it is sufficient that a venture has some voice or right to be heard in the control and management of the venture. *Estate of Hernandez v. FI??*, 187 Ariz. 506, 509-10, 930 P.2d 1309, 1312, 13 (1997). Select Medical Corporation indisputably had a voice or right to be heard in the control and management of Select Specialty Hospital. Moreover, the Corporate Defendants have a financial incentive for the facility to be profitable and they derive financial benefit from its successful operation, PSOF ¶¶ 200-207. Accordingly, Select Medical Corporation meets the requirements for a Joint venture and, in turn, liability in connection therewith.